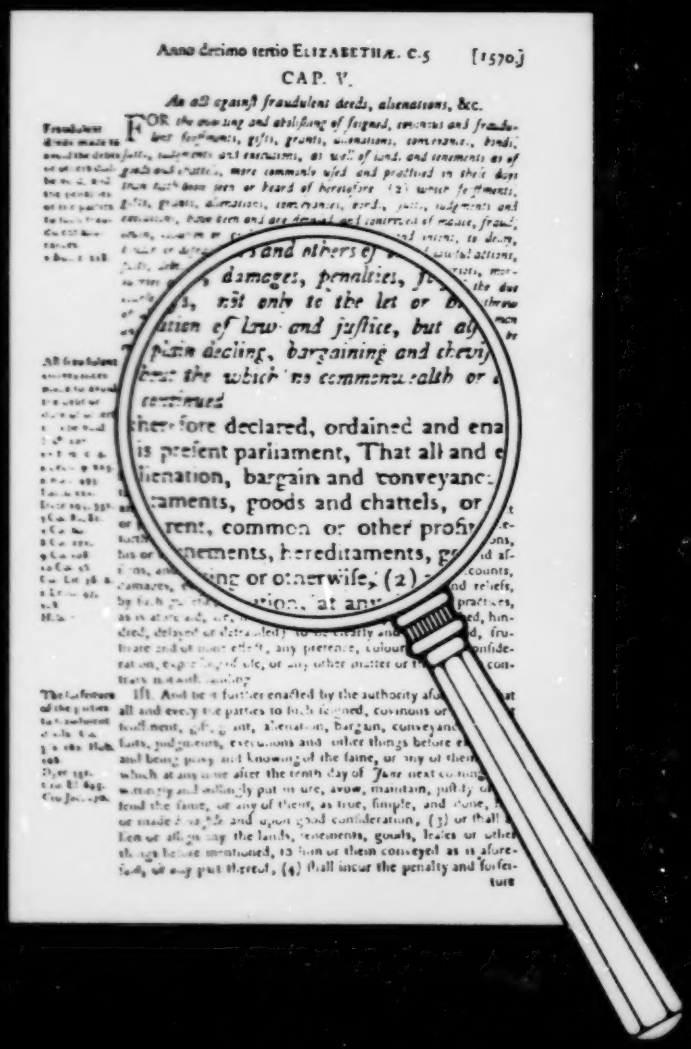
Law Reform Commission of Saskatchewan

Tentative Proposals Relating to Testamentary Custody and Guardianship of Children

Saskatchewan


Anno decimo tertio ELIZABETHÆ. c. 5 [1570]

CAP. V.

An act against fraudulent deeds, alienations, &c.

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in this realm than hath been seen or heard of heretofore (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or [illegible] and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, [illegible] the due [illegible], not only to the let or hindrance of the due execution of the laws and justice, but also to the [illegible] plain dealing, bargaining and chevisance between man and man, whereupon doth ensue the ruin and decay of many honest men's estates, and the overthrow of many [illegible] continued

therefore declared, ordained and enacted by the authority aforesaid, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, goods and chattels, or any of them, or any rent, common or other profit [illegible] hereditaments, goods and chattels, or any of them, by writing or otherwise, (2) and all bonds, suits, judgments, executions, and other things before mentioned, had, made, or to be had or made, to or for any intent or purpose before declared and expressed, shall be deemed and taken only as against that person or persons, his heirs, successors, executors, administrators and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, hindrances or delays by the same feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, executions and other things before mentioned and to every of them is, are or might be in any wise let, hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect, any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bond, suit, judgment, execution and other things before mentioned, and being privy and knowing of the same, or any of them, which at any time after the tenth day of *June* next coming, willingly and wittingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bona fide* and upon good consideration, (3) or shall lease or alien any the lands, tenements, goods, leases or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof, (4) shall incur the penalty and forfeiture

85-1390/

Acknowledgement

Funding for the background research upon which the proposals in this report are based was provided in part by the Law Foundation of Saskatchewan.

TENTATIVE PROPOSALS RELATING TO TESTAMENTARY CUSTODY AND GUARDIANSHIP OF CHILDREN

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

October, 1984

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor Douglas A. Schmeiser, Q.C., B.A., LL.B., LL.M., S.J.D., Chairman

Miss Marjorie A. Gerwing, Q.C., B.A., LL.B.

Mr. Gordon J. Kuski, Q.C., LL.B.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., M.A., LL.B. and Mr. C. Peter Thagard, LL.B. are the Legal Research Officers. Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting and Mrs. Sandy Antonini-Ready, B.A., LL.B. are full-time consultants to the Commission. The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

* * * * * * * * * * *

The Law Reform Commission Act.

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

* * * * * * * * * * *

N o t e
****

These proposals have been prepared by the research staff of the Commission and have been tentatively adopted by the Commissioners. It is the policy of the Commission to seek public response to its proposals before a final report is prepared for presentation to the Minister of Justice. Accordingly, the Commission welcomes comments and criticisms.

Submissions should be directed to:

Law Reform Commission of Saskatchewan,
10th Floor, Sturdy-Stone Centre,
122 Third Avenue North,
SASKATOON, Saskatchewan.
S7K 2H6

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF MAJOR PROPOSALS 1

II. HISTORY OF THE LAW OF GUARDIANSHIP IN SASKATCHEWAN . . . 4

A. The Law Prior to The Infants Act 4

1. Guardianship for Nurture, by Nature or by Parental Authority 5

2. Testamentary Guardianship 6

3. Court Appointed Guardians 6

B. The Infants Act of Saskatchewan - 1918 to 1984 . . 7

1. The Legislation 7

2. The Case Law 10

C. Conclusion 13

III. TENTATIVE PROPOSALS 14

A. General 14

1. Terminology 14

2. Survivorship 17

B. Testamentary Custody of Saskatchewan 20

1. Testamentary Appointment of Persons to have Custody 20

(a) Who may make an appointment? 21

(b) When will the appointment take effect? . . . 22

(c) For which children may an appointment be made? 23

(d) How is the appointment made? 23

(e) Consent of appointee required 24

2. Simultaneous Deaths 24

3. Miscellaneous 25

C. Guardianship of the Property of Children 26

1. Court Appointment of Guardians 26

2. Notice to the Public Trustee and Others 29

3. Joint Guardians 29

4. Criteria for Appointment 29

5. Record of Appointments 30

6. Security 31

7. Disputes Between Guardians 31

8. Removal and Resignation of Guardians 32

9. Passing of Accounts 32

10. Transfer of Property on Termination of Guardianship 33

11. Fees of Guardians 34

12. Guardians' Powers of Investment 34

13. Guardians subject to The Public Trustee Act 35

D. Miscellaneous Proposals 36

1. Definitions 36

2. Maintenance 37

3. Joint Custody. 38

4. Transition 38

E. Testamentary Trusts for the Benefit of Children . . 39

IV. MISCELLANEOUS AMENDMENTS 42

A. The Public Trustee Act 42

B. The Trustee Act 44

C. Actions for Seduction 45

APPENDIX I - An Act respecting the Custody and Maintenance of Children and the Guardianship of their Property 46

APPENDIX II - Consequential Amendments to The Public Trustee Act 57

APPENDIX III - An Act respecting the Abolition of Actions for Seduction 58

I. INTRODUCTION AND SUMMARY OF MAJOR PROPOSALS

The issues of child custody and guardianship of children were examined in the December, 1981 final report of the Law Reform Commission of Saskatchewan, entitled "Proposals on Custody, Parental Guardianship and the Civil Rights of Minors" (the "1981 Custody Report"). Recommendations were proposed for reform of The Infants Act.[1] Two separate aspects of child custody and guardianship were not reviewed in that report. These were:

(a) testamentary guardianship of the person of a child and of a child's property. This refers to the appointment by parents by will or deed of guardians of their children that is effective upon the death of the parents; and

(b) guardianship of a child's property, during and after the lifetime of the child's parents.

This report examines the law of guardianship of a child's person and estate and makes proposals for reform.

This report contains a draft of a Children's Act which will replace The Infants Act. A complete revision of the present Act is necessary for the following reasons:

(a) The Commission's 1981 Custody Report contains numerous recommendations for change to The Infants Act. These

---

[1] R.S.S. 1978, c. I-9 (referred to in this report as "The Infants Act" or the "present Act").

recommendations refine the custody provisions which came into force in 1978.

(b) Thirty eight sections of The Infants Act have been repealed by The Public Trustee Consequential Amendment Act[2]. These provisions have been reformulated in The Public Trustee Act.[3] As a result, The Infants Act is disjointed and littered with repealed sections. The sections that remain are often archaic and require modernization.

(c) The provisions of The Infants Act relating to testamentary guardianship and guardianship of a child's estate require repeal, clarification, modernization or replacement.

The proposed Children's Act (Appendix I of this report) incorporates many of the recommendations contained in the Commission's 1981 Custody Report[4] as well as the proposals contained in this report.

Summary of Major Proposals

The major proposals incorporated in the proposed Children's Act are as follows:

1. The words "child" and "children" should replace the words "infant" and "infants".

---

2 R.S.S. 1983, c. P-43.1.

3 R.S.S. 1983, c. 80.

4 Recommendations I, II, III, VII, VIII and XVI(1) of the Custody Report have not been included in the proposed Children's Act.

2. The term "custody" should replace the term "guardianship of the person of an infant". The term "guardianship of the property of a child" should replace the term "guardianship of the estate of an infant."

3. A person having custody of a child may by will appoint a person to have custody after his death, but the appointment is not effective if at the time of his death the appointor and another person were equally entitled to custody. Where the appointer and another person were equally entitled to custody and the custody of one has been terminated by written agreement or court order, the testamentary appointment by the custodial person is not effective unless the written agreement provides for custody on the death of the appointor or the court order has denied the other person access to the child.

4. Any person wishing to be guardian of the property of a child, whether a parent of the child or a person appointed in a will as a guardian of the child's property, must apply to court to be appointed guardian of the child's property and to provide such security as the court thinks appropriate. The rules governing such guardians have been clarified.

5. A person who by will is appointed trustee of a child's property should not be required to seek appointment as guardian of the property of a child, but the Public Trustee should have the authority to apply to court to request that the trustee be required to provide such security as the court thinks appropriate and to file and pass his accounts.

II. HISTORY OF THE LAW OF GUARDIANSHIP IN SASKATCHEWAN

A. The Law Prior to The Infants Act[5]

Sir Frederick Pollock and Frederic Maitland stated that "[n]o part of our old law was more disjointed and incomplete than that which deals with the guardianship of an infant".[6] In the late seventeenth and early eighteenth century there were no less than eleven identifiable forms of guardianship in English law, each designed to fill a particular need and each with its own rules.[7] By 1870 a number of these forms of guardianship had fallen into disuse, had been repealed, or were inapplicable to Saskatchewan. As a result, only three basic forms of guardianship of a child became part of Saskatchewan law.[8]

---

5 The Infants Act, S.S. 1918-19, c. 82, (referred to in this report as the "1918 Act").

6 Sir Frederick Pollock and Frederic William Maitland, The History of English Law Before the Time of Edward I, 1895, Vol. II, 443, [para. 441].

7 Edward Coke, The First Part of the Institute of the Laws of England; or, a Commentary upon Littleton, with notes by Francis Hargrave, ed. Charles Butler, 19th ed., 1832, vol. I, Section 88(b), (referred to in this report as "Co. Litt."). Mr. Hargraves' notes were an invaluable reference on the law of guardianship.

8 The North-West Territories Act, R.S.C. 1886, c. 50, s. 11 and The Saskatchewan Act, 4 & 5 Edw. VII, c. 42, s. 16.

1. Guardianship for Nurture, by Nature or by Parental Authority[9]

Guardianship for nurture, by nature or by parental authority were forms of parental guardianship that operated where the law did not otherwise provide for guardianship. In guardianship for nurture the parents of the child were guardians until the child reached the age of 14 years. Guardianship by nature was the guardianship by the father of his heir apparent until the heir reached the age of 21 years. By 1870 these two forms of guardianship had declined in importance in English law. This decline was accompanied by the development of a general form of guardianship--guardianship by parental authority or parental right. Guardianship by parental authority was the guardianship by parents of all their children until the child reached the age of 21 years.

These forms of guardianship were only in respect of the child's person and not of the child's estate. As such, the guardian could not demand payment to himself of any money owing to the child. Nor could he give a valid discharge for a receipt of money.[10] If money belonging to a child was paid to the

---

9 21 Hals. Laws, (3rd ed.), 203 (para. 450).

10 Dagley v. Tolferry (1715), 24 E.R. 391.

guardian for some reason, he would have to account to the child.[11]

2. Testamentary Guardianship

The Tenures Abolition Act, 1660 was part of English law in 1870, and became part of Saskatchewan law when Saskatchewan became a province.[12] The 1660 Act allowed a father to dispose of the custody of his unmarried children under the age of 21 by will or deed even though the mother might still be alive. The Act also provided that the guardian so appointed could take into custody the rents and profits of the child's land for the use of the child. The testamentary guardian, as this guardian came to be called, was in essence a mere custodian of the child's property and had no power to alienate the child's land or dispose of it.

3. Court Appointed Guardians

Francis Hargrave in his notes on Coke on Littleton concluded that the jurisdiction of the Court of Equity to appoint guardians where the law did not otherwise provide was unquestionable as at

---

11 In Re Sherwin Estate, In Re Langley Estate, [1927] 2 W.W.R. 609, (Sask. K.B.), at 615.

12 12 Car. 2, c. 24. (referred to in this report as the "1660 Act"). See In Re Sherwin Estate, ibid.

1696.[13] By 1870, the Court of Equity's jurisdiction to appoint a guardian of a child included the ability to remove an unfit father and to substitute the mother as guardian. Additionally, the Court of Equity could appoint the mother as guardian upon the father's death.

B. The Infants Act of Saskatchewan - 1918 to 1984

1. The Legislation

The first Saskatchewan legislation concerning guardianship was passed in 1918.[14] The 1918 Act adopted many of the principles contained in the common law, the 1660 Act, and the rules of equity regarding guardianship. The following provisions of the 1918 Act should be noted:

1. Section 2 of the 1918 Act provided that the father was to have custody of his infant. This reflects the common law concept of the father as guardian for nurture, by nature or by parental authority.

2. Section 4 of the 1918 Act, which allowed a father to dispose of the custody of his infant children, embodied the provisions of the 1660 Act. Unlike the 1660 Act, however, section 4 did not indicate that a guardian so appointed could receive the rents and profits of the infant's estate.

3. The authority of the Court of Equity to appoint a guardian was included in the 1918 Act. The 1918 Act provided that

---

13 Co. Litt. 88(b), Hargrave's note (16).

14 The Infants Act, supra, footnote 5.

upon notice to the mother of the infant, the court could appoint a person to be guardian of the infant.

4. The 1918 Act recognized the rights given to mothers by the Court of Equity. Under section 23 of the 1918 Act the Court could name the mother as guardian of the infant's person on the father's death. Additionally, the mother was given a right to appoint a guardian to act upon her death but this appointment had to be confirmed by the court.

5. Section 28 of the 1918 Act set out the authority of guardians, "appointed or constituted by virtue" of the Act. These powers included the right to act for and on behalf of the infant, appear in court and prosecute or defend proceedings in the infant's name, have the care of his estate and custody of his person and care of his education. The 1918 Act did not indicate whether it was intended that the "father" (entitled to custody under section 4) or "testamentary guardian", were to fall within the words "appointed or constituted by virtue" of the Act.

In 1920 amendments were made to the 1918 Act.[15] Section 2 was amended so that the mother was to have custody until the infant reached the age of fourteen years or until the mother's death; the father was entitled thereafter. Subsection 4(1) was amended so that the surviving parent of an infant could by deed or by will dispose of the infant's custody from time to time as he or she thought fit. This provision has not been repealed or amended. In addition, the 1918 Act was amended to provide that the court could name a guardian for an infant who did not have a

---

15 An Act to amend The Infants Act, S.S. 1919-20, c. 77.

guardian and could remove the parent or guardian and appoint a new guardian where the court was of the opinion the parent or guardian was unfit. This section remains in the present Act.

The 1925-26 Act to amend the Infants Act substantially recast The Infants Act into its present form.[16] The concept of one parent having custody was replaced with the concept that the parents are joint guardians. The mother's right to appoint a guardian was expanded; her appointment did not need court approval. The provision of the 1918 Act that allowed the mother to name a guardian was amended to provide that both the mother and father could name a guardian. Additionally, section 23 provides that the surviving parent and a testamentary guardian appointed by the deceased parent, if any, are joint guardians of the infant.

In 1931 the Act was amended to require that security be given before a guardian constituted or appointed under the Act has the care and management of the infant's estate.[17] This power over the estate was expanded to include the power to give a release in respect of money received by the guardian.

In April 1984, The Public Trustee Consequential Amendment Act came into force. As a result, numerous sections contained in The Infants Act were repealed. Additionally, three sections were

---

16 S.S. 1925-26, c. 42, (referred to in this report as the "1926 amendments").

17 An Act to amend The Infants Act, S.S. 1931, c. 64.

added to The Infants Act. Section 29 of The Infants Act now provides that a person, who in the opinion of the court represents the interests of the infant, may apply to court for an order requiring the guardian of the estate of an infant, other than the Public Trustee, to bring in his accounts and to have them passed. This authority of the court extends to the final passing of accounts after the infant has attained the age of majority.

Section 30 of The Infants Act now provides as follows:

> A testator may not by his will appoint a guardian or trustee of the estate of an infant, other than the executor of his will, to act without bond but, where a person is appointed as guardian or trustee of the estate of an infant in a will by a testator, he may apply for an order of guardianship under section 21.

Finally, section 31 of The Infants Act as amended provides that a guardian of the estate of an infant appointed by the court is subject to the provisions of The Trustee Act and The Public Trustee Act.

2. The Case Law

Prior to The Infants Act of 1918 there were no reported cases dealing with guardianship of infants' estates. In fact there was little or no reported judicial comment on guardianship of infants' estates until 1927 when the first of a line of cases was decided. The issue in these cases was whether parents, as

joint guardians of their infants (or as guardian upon the death of the other parent) were guardians of their infants' estates without court appointment, and thereby entitled to have the care and management of the infant's estate and to exercise those powers listed in section 28.

In two cases, Taylor J. of the Court of King's Bench held that the guardianship by parents of their children was not a guardianship in which the parents were "constituted or appointed by virtue" of the Act.[18] Thus, notwithstanding that parents were joint guardians under section 22 (or guardian upon the death of the other parent under subsection 23(1)), they did not have the powers enumerated under section 28 unless they were appointed as guardians by the court. Taylor J. stated that parents at common law had no rights over the infant's estate and could not give a valid receipt for any property received. Taylor J. stated that if the Legislature intended to make a break from these "well-established principles" of the common law, it would have used clearer language in section 28.[19]

Another judge in the 1930's, however, was of the opposite opinion. In In Re Infant's Act; In Re Sherrer, Bigelow J. refused to appoint a mother as guardian because he thought that,

---

18 In Re Sherwin Estate, In Re Langley Estate, ibid., footnote 9, at 618, and In Re Nakauchi Estate, [1927] 2 W.W.R. 609, (Sask. K.B.).

19 In Re Nakauchi Estate, ibid., at 608.

being the surviving parent she already was a guardian possessed of all the powers listed in section 28.[20] Bigelow held the same in In Re Clason Estate, but his decision was appealed to the Court of Appeal.[21]

The Court of Appeal could have put the matter to rest in the Clason case but failed to do so on the ground that it would be inappropriate to set a precedent because there had not been argument on both sides in the case. The Court did appoint the parent as guardian. Turgeon J.A., with whom Haultain C.J.S. concurred, raised some doubt as to the argument that the parent had the powers listed in section 28. Martin J. expressed an opinion that it was unlikely that the Legislature intended parents as joint guardians or a surviving parent to have the powers listed in section 28, i.e., authority to have the care and management of the infant's estate.[22]

This issue was last raised in 1978 in In Re Bean.[23] The only significant change in the legislation between 1931 and 1978 was the provision that guardians under section 28 had to give security before obtaining the care and management of the infant's estate. Halvorson J. did not follow Taylor J. or the Court of

---

20 [1930] 3 W.W.R. 229 (Sask. K.B.).

21 [1931] 1 W.W.R. 504 (Sask. C.A.).

22 Ibid., at p. 508.

23 (1978), 5 R.F.L. (2d) 281, (Sask. Q.B.).

Appeal. He stated that the cases could be distinguished because the legislation had been changed. Halvorson J. followed Bigelow J.'s approach and refused to appoint the parent as guardian on the ground that the application was unnecessary.

None of the other provisions relating to testamentary guardianship and guardianship of an infant's estate have sparked much litigation and in fact several of the relevant provisions have never been judicially considered.

C. Conclusion

The provisions of the present Act relating to testamentary guardianship and guardianship of the estates of children are a hodge-podge of common law principles, rules of equity and portions of the 1660 Act. Reform of the Act has been piecemeal. Judicial interpretation of the provisions has not helped to clarify the Act because decisions are sparse. On the one issue where there are a number of reported cases, the decisions are conflicting. Often the law is uncertain and at times it is necessary to look to the law of Saskatchewan at the time it became a province, which in the area of testamentary guardianship dates back to the 1660 Act. The Saskatchewan law is every bit as "disjointed and incomplete" as the English law was in the 1800's. The law relating to testamentary guardianship and guardianship of children's estates requires modernization.

III. TENTATIVE PROPOSALS

A. General

1. Terminology

In two respects the terminology used in The Infants Act should be reformed. The use of the word "infant" to represent all persons under the age of eighteen is archaic and inappropriate. Today most people would think of a very young child wnen the term "infant" is used. The recent trend in other jurisdictions is to use "child" and "children". It is suggested that these words reflect more appropriately the persons to whom the legislation applies. Therefore "child" and "children" are used in the proposed Act. Accordingly, the proposed Act is called The Children's Act.

There is another area where terminology presents a problem in the present Act. The distinction between guardianship of the person and guardianship of the infant's estate is uncontroversial. The difference between "custody" and "guardianship of the infant's person", however, is not clear. This confusion can be traced to the 1660 Act which permitted the father to dispose of the "custody" of his infant. The use of the concepts of "custody" and "guardianship of the person" still exist in the present Act; the surviving parent under section 4 can dispose of the "custody" of his or her infant children and parents can also appoint "guardians of their infant children"

under section 24. The court can award "custody" under section 3 but may also appoint a "guardian of the person of an infant" under section 21.

Lord Sachs in Hewer v. Bryant attempted to explain the difference between "custody" and "guardianship of the person" in the following passage:

> ...amongst the various meanings of the word "custody", there are two in common use in relation to infants...One is...limited and refers to the power physically to control the infant's movements.
>
> In its wider meaning the word "custody" is used as if it were almost the equivalent of "guardianship" in the fullest sense...such guardianship embraces a "bundle of rights"...These include powers to control education, the choice of religion...(and) the personal power physically to control the infant...It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, i.e., such personal power of physical control as a parent or guardian may have.[24]

This overlap between "custody" and "guardianship of the person" should be eliminated. In Saskatchewan "custody" is used in the wider sense relating to a bundle of rights.[25] It is therefore appropriate that the term "custody" should replace

---

24 [1969] 3 All E.R. 578, at 584-585.

25 Huber v. Huber (1975), 18 R.F.L. 378 (Sask. Q.B.) and Donald v. Donald (1980), 3 Sask. R. 202 (Sask. Q.B.). In these two cases Johnson J. considered "custody" more than mere physical possession of the child. He divided custody of the person of the child and the control of the child's education and religion between the parents.

"guardianship of the person". The meaning of "custody" depends upon the powers which are associated with it. Accordingly, those powers should be defined. For this reason the following definition of custody is proposed:

> Custody of a child is the authority to care for a child and his education, and to exercise that degree of control over the child that is consistent with the age, maturity and welfare of the child.

This drafting is based on the 1981 Custody Report.

Section 22 of the present Act, which provides that parents are joint guardians of their infant children, must be amended to reflect the change in terminology proposed in this report. Except as may be otherwise provided in the proposed Act, parents of a child should be equally entitled to custody of their children. In addition, subsection 22(1) of the present Act, which requires parents to be bound by a custody agreement into which they have entered, should be retained.

Custody is an exclusive concept that covers all the rights a person may have over a child's person, other than the right to access. Guardianship of the child's property should be another exclusive category that encompasses the rights a person may exercise in respect of a child's property. Guardianship of the property of a child should be defined as:

> ...the authority to care for and manage the real and personal property of the child, including the right to receive any money due and payable to the child and give a release in respect thereof.

Therefore any reference to guardianship in this report or in the proposed Act will mean guardianship of the property of a child. "Property" of the child is preferred to "estate" because the latter in modern usage suggests the property of a deceased person.

The powers of the guardian of the property of a child are derived from section 28 of the present Act. Clauses 28(a) and (b) of the present Act, which relate to the power of the guardian to act on behalf of the infant or to appear in court and prosecute or defend any action in the infant's name, should not be retained. This adopts the recommendation contained in the 1981 Custody Report that these provisions are unnecessary.

2. Survivorship

Section 23(1) of The Infants Act provides that upon the death of one parent, the surviving parent is the guardian alone or jointly with the testamentary guardian appointed by the deceased parent. Under subsection 23(2) the court has authority to appoint a person to act as guardian jointly with the surviving parent. These provisions should be replaced with a rule of survivorship, i.e., if two persons are entitled to custody, the survivor of the two should be allowed to continue as the sole custodian without interference from a testamentary custodian or person appointed by the court. The right to custody of parents or others should not be treated as a property right which may be

bequeathed. Although the desire of the deceased person is important, the right of the surviving parent to raise the child should not be compromised by the appointment of a testamentary custodian by the deceased parent. The question should be whether the surviving parent is fit to be the custodian. The only avenues the court should have to interfere with the surviving parent as custodian are protection proceedings in The Family Services Act where sufficient grounds exist for the removal of the child from the parent,[26] or where another person has applied for custody. The right of the surviving parent or person entitled to custody to independently care for the child should not be infringed by a testamentary custodian or a court-appointed custodian. A parent or other person having custody of a child should not, however, be prevented from naming a testamentary custodian. Rather, the appointment should not be effective if there is another person entitled to custody.

There may, however, be a problem where the parents of the child have separated and have agreed or the court has ordered that only one of them is entitled to custody. Under subsection 23(1) of the present Act the non-custodial parent is guardian upon the death of the other parent. This should be retained but expanded to include persons other than parents. In general, the non-custodial parent or person previously entitled to custody

---

[26] R.S.S. 1978, c. F-7.

should automatically become entitled to custody of a child upon the death of the person having custody. Often both persons entitled to custody, particularly parents, wish to have custody of the child on a marriage breakdown and both are usually competent to care for the child. In practice, however, the persons entitled to custody will agree or the court will order that one of the two will be the only person entitled to custody. This determination made between the persons entitled to custody during their lifetime should not preclude the non-custodial person's entitlement to custody of the child in the event of the death of the custodial person. Therefore the appointment of a custodian by the person entitled to custody should have no effect if there is another person who may become entitled to custody, i.e., a person whose right to custody was terminated by court order or agreement. This person should become entitled to custody of the child notwithstanding the appointment of a testamentary custodian by the deceased person.

There are two situations where this survivorship rule should not extend to a non-custodial person. First, where the non-custodial person has entered into a custody agreement that provides for custody of the child on the death of the custodial person, the custodial person should be entitled to appoint a testamentary custodian secure in the knowledge that the child

will be cared for by the person the custodial person has chosen. The non-custodial person prima facie should be bound by the custody agreement.

Second, the survivorship rule should not extend to a non-custodial person to whom access has been denied. The rationale for this restriction is that when a court refuses access to a parent or other person, there must be good reason why the non-custodial person should not be involved in the child's life. If this is the case, the non-custodial, non-access person should not become entitled to custody of the child upon the custodial person's death.

These restrictions are not ironclad nor do they permanently eliminate the non-custodial person from the child's life. They simply establish general rules. The disentitled non-custodial person may apply to court for custody and the court will make a decision based on the child's best interests.

B. Testamentary Custody

1. Testamentary Appointment of Persons to have Custody

The provisions of the present Act relating to testamentary custody are confusing. Subsection 4(1) provides that a surviving parent may from time to time by will or deed, dispose of the custody of his or her infant children. On the other hand, under subsection 24(1) parents may by will appoint persons to be

guardians of their infant children after their deaths. These provisions should be replaced by a single provision which sets out that a person having custody of a child may by will appoint one or more persons to have custody of the child after his or her death. A detailed discussion of the proposed provision is necessary.

(a) Who may make an appointment?

Any person having custody of a child should be entitled to name by will a person to have custody of the child. This would encompass three different situations. First it would allow the parents of children to make an appointment where both are entitled to custody.

Secondly, persons, other than parents, who are entitled to custody, would be allowed to name by will a person to have custody. Persons entrusted with custody of the child should be allowed to name a successor in the event of their deaths. If someone feels more entitled to have custody of the child than the person so named, they can apply for custody and the court will decide what is best for the child.

Finally, where by agreement or court order a person is entitled to custody, only that person would be allowed to make an appointment. Only the custodial person should be able to name a person to have custody because the custodial person is most

involved in the child's life and should make the determination. This provision is not as serious a restriction as it might seem because of the survivorship rule. It will be recalled that the non-custodial person will be entitled to custody upon the custodial person's death as long as he or she is not disqualified by an agreement or by having been denied access. Upon the custodial person's death, the non-custodial person would become the person entitled to custody and would therefore be able to name by will a person to have custody of the child.

(b) When will the appointment take effect?

Section 4 of the present Act permits the surviving parent to dispose of the custody of an infant in any manner and from "time to time" as he or she thinks fit. This wording appears to allow a parent during his own lifetime to contract with someone for the permanent custody of the child. This would permit a parent to avoid the programs of the Department of Social Services designed for the orderly and controlled adoption of children. A parent who wishes someone other than the other parent to have legal custody of a child during his lifetime should be permitted to proceed only through the recognized adoption or custody proceedings. For this reason, the appointment of a person to have custody should take effect upon the death of the appointor.

(c) For which children may an appointment be made?

Subsection 24(1) of the present Act allows the parent to make an appointment of a guardian where the infant is unmarried. The emphasis of this section is incorrect. It is the entitlement to custody which ends when the child is married, not simply the right of a parent to appoint by will a person to have custody. As a result, custody and access should terminate when the child marries or reaches 18 years of age. When either of these events occur, the person would no longer be entitled to custody and any appointment of a person to have custody would be ineffective.

(d) How is the appointment made?

The appointment of a person to have custody should be made by will where the person entitled to custody is capable of making a will. Subsection 24(1) of the present Act allows a father or mother to make an appointment by deed if they are not of full age. The general rule is that a minor is not capable of making a will. The Wills Act allows a minor who is married to make a will,[27] but a parent who is an unmarried minor cannot do so. For this reason an unmarried parent who is a minor should be able to

---

[27] R.S.S. 1978, c. W-14, s. 5.

appoint a person to have custody of his or her child by written appointment. A written appointment is preferred to a deed.[28]

(e) Consent of appointee required

The appointment by will of a person to have custody must be effective upon the death of the appointor so that there is no gap in law as to who is entitled to custody of the child. However, it would not be appropriate to require the person appointed to hold that position against his will. It is therefore proposed that an appointment may be renounced by the person so appointed if the person has not taken custody of the child.

2. Simultaneous Deaths

The rule that the survivor of persons having custody is alone entitled to custody can create an unfairness which should be addressed. If two persons entitled to custody die simultaneously, The Survivorship Act deems that the eldest died first.[29] If the persons entitled to custody have named different persons to have custody, the youngest person's designation would govern. Most would agree that if two persons were each entitled to custody on death, their appointment should be given equal

---

28 A deed is undesirable in this context because a deed is most frequently used in the popular sense as a conveyance of real property and it must be made under seal.

29 R.S.S. 1978, c. S-67, s. 2.

weight. Therefore, it is proposed that where persons having custody die within fifteen days of one another, the appointment made by them should be effective and all persons so appointed should jointly be entitled to the custody of the child. If any of the persons so appointed are unsatisfied with this result, they can apply to court for a determination of custody. Fifteen days is chosen as it is a guide given by the medical profession as to the period after which a person who has been in a common accident will most likely survive.

3. Miscellaneous

Two provisions of the present Act relating to testamentary custody taken almost word for word from the 1660 Act remain to be discussed. Subsection 4(2) provides that a disposition by a surviving parent of his or her infant children by deed or will, shall be good and effectual against any person claiming the custody or education of the infant. The proposals in this report establish the circumstances where a testamentary appointment of a person to have custody is or is not effective. Subsection 4(2) is therefore unnecessary.

Subsection 4(3) provides that the person to whom custody of an infant is committed by the parents by deed or will:

> ....may maintain an action against any person who wrongfully takes away or detains him, for the recovery of the infant and for damages for such taking

away or detention for the use and benefit of the infant.

Subsection 4(3) creates a civil remedy available to the person named by will to have custody when the infant has been wrongly taken away or detained. This provision is archaic and should not be retained. A criminal recourse for punishment of someone who wrongfully takes away or detains a child is available under the Criminal Code.[30]

C. Guardianship of the Property of Children

1. Court Appointment of Guardians

There is some question whether parents or testamentary guardians are guardians of the property of a child without court appointment. It is proposed that any person wishing to be guardian of the property of a child, including parents and persons named as testamentary guardians, should obtain court appointment. The reasons are as follows:

(a) Under the present Act, persons desiring to have the care and management of a child's property must give such security as the court shall require. As a result, the person must apply to court. Requiring the court to appoint the person as guardian would not necessitate a further court application as the appointment and setting of security could be done in one application.

---

30 R.S.C. 1970, c. C-34, ss. 250, 250.1 and 250.2.

(b) By requiring the guardian of the property of a child to be court appointed and by setting out criteria which the court shall consider in so appointing, the court would be given a discretion that could be exercised to ensure that a fit person is appointed as guardian. There may be situations where a parent or testamentary guardian may be unfit to be the guardian of the property of the child and the court should have the authority to make this determination.

(c) This approach is consistent with the view that the law of Saskatchewan prior to the 1918 Infants Act has not been modified by legislation with the result that parents are not guardians of the estate of a child without court appointment.

The court should be able to appoint one or more guardians and the Act should state that no person other than the person so appointed is guardian. This would make it clear that neither parents nor testamentary guardians are, without court appointment, guardians of the child's property.

Since all persons wishing to have the guardianship of the property of a child must apply to court to be appointed, the testamentary appointment of guardians would be unnecessary and redundant. This move away from the use of testamentary guardianship is consistent with current practice in the drafting of wills. Guardians of the property of children are not often appointed. In most wills a trust is set up for the benefit of the child. The need for a guardian is thereby avoided. In

addition, if a person is appointed a guardian, the person making the will generally intends that the guardian should care for the person of the child and does not intend to appoint a guardian of the child's property. The proposals contained in this paper would accelerate this trend away from the testamentary appointment of guardians of a child's property. The proposed Act contains no provisions concerning the testamentary appointment of guardians. To remove any doubt, the proposed Act provides that if a person making a will does appoint a testamentary guardian of the property of a child, the appointment confers no right on the person so appointed but the person appointed may apply to the court to be appointed as guardian of the property of a child. The court would no doubt take into account the fact that the person making the will had nominated certain persons to be the guardians of the child's property.

Subsection 21(1) of the present Act provides that letters of appointment may be obtained as in the case of letters of administration. The Local Registrar of the Court of Queen's Bench in the Judicial Centre of Saskatoon has advised that these letters do not take any particular form. For this reason, and since an ordinary court order can serve any purpose that might be served by letters of appointment, it is proposed that the concept of letters of appointment be dispensed with in the proposed Act.

2. Notice to the Public Trustee and Others

The Public Trustee Act creates the office of Public Trustee which replaces the office of Official Guardian. The duty of the Public Trustee is to protect the interest that a child has or might have in property. The Public Trustee has an interest in knowing who is guardian of a child's estate. Accordingly, notice of an application for the appointment of a guardian should be given to the Public Trustee.

In addition, if any other person appears to the court to be interested in the guardianship of the child's property, the court should be able to order that notice be given to such person.

3. Joint Guardians

To clarify the relationship between guardians and to ensure the joint nature of guardianship where there is more than one guardian, the Act should provide that guardians of the property of a child are jointly responsible for the care and management of the property of the child.

4. Criteria for Appointment

The only guidance given the court in appointing guardians under the present Act is that contained in subsection 21(3), which provides that no guardian shall be appointed to the person or estate of an infant of the age of fourteen years or over

without the consent of the infant. It is proposed that the court, in appointing a guardian of the property of a child, shall consider all the circumstances, including the applicant's ability to manage the property, the plans of the applicant for the care and management of the property, the relationship between the child and the applicant, and the preferences of the child to the extent the court considers appropriate having regard to the age and maturity of the child. These considerations will enable the court to inquire whether the applicant is fit to be guardian of the property of the child. It is submitted that the provision requiring the consent of children over fourteen years of age is arbitrary and inflexible.

5. Record of Appointments

Subsection 21(2) of the present Act requires the court to keep a record of the appointment and removal of guardians in like manner as in the case of probate and administration. The Local Registrar of the Court of Queen's Bench at the Judicial Centre of Saskatoon has advised that no special record is kept save the actual court file. For this reason it is proposed that the Act simply require the clerk of the Court of Queen's Bench to keep a record of every appointment and removal by the court of a guardian of the property of a child.

6. Security

Clause 28(c) of the present Act requires the guardian of the infant's estate to give security. Subsection 27(1) instructs the court as to what kind of security is required and subsection 27(3) allows the court to dispense with the bond where it deems fit. These provisions should be consolidated. It is therefore proposed that the court shall require a guardian of the property of a child other than the Public Trustee to post a bond, with or without sureties, payable to the child in the amount that the court considers appropriate, but the court may dispense with the requirements of a bond if it is of the opinion that a bond is not needed to protect the interests of the child.

7. Disputes Between Guardians

In the event of disputes between guardians in relation to any question affecting the welfare of the infant, a guardian may apply to the court for direction under subsection 24(2) of the present Act. This should be retained. In addition, a guardian should be able to apply to court for directions as to the guardianship of the child's property.

8. Removal and Resignation of Guardians

The present Act appears to create two tests for the removal of guardians. Parents or lawful guardians may be removed where unfit under section 23. Under subsection 26(1) testamentary guardians or guardians appointed by the court are removable for the same causes for which trustees are removable. It is proposed that the grounds for removal of a guardian of a child's estate should be restricted to the same causes for which trustees are removable. The trustee test is appropriate because both the relationship of trustee and beneficiary and guardian and ward are fiduciary relationships. The duties expected of the trustee and guardian are similar. The case law respecting the removal of trustees will be available for guidance.

Subsection 26(2) of the present Act permits a guardian to resign his office on such terms and conditions as the court deems just. This provision should be retained.

9. Passing of Accounts

New provisions in The Infants Act for accounting by guardians were added by The Public Trustee Consequential Amendment Act. These provisions should be retained with one modification. The consequential amendment provides that the authority to require an accounting applies to the final accounting "after the infant has attained the age of majority".

However, as will be seen below, guardianship may end not only upon the child attaining the age of majority but also upon the marriage of the child. For this reason, the authority of the court to require an accounting should extend to a final passing of accounts after the "termination of the guardianship of the child", which term would encompass the occurrence of marriage or the child reaching the age of majority.

10. Transfer of Property on Termination of Guardianship

Subsection 27(2) of the present Act leaves doubt as to when the guardianship of the property of an infant ends. The circumstances under which guardianship ends should be established. It is proposed that the guardianship of the property of a child should terminate on the marriage of the child or on the child attaining the age of majority.

Subsection 27(2) of the present Act requires guardians to transfer the property to the infant upon the infant attaining eighteen years, upon the determination of the guardianship, or sooner if the court so orders. The guardian should transfer the property to the child upon the termination of guardianship, i.e., upon the child attaining the age of majority or upon the child's marriage.

11. Fees of Guardians

A guardian should be entitled to payment of a reasonable amount for his services for management of the property of the child and his expenses. This is, in substance, the effect of subsection 27(2) of the present Act.

12. Guardians' Powers of Investment

Prior to the enactment of The Public Trustee Act consequential amendments to The Infants Act, a guardian could invest a child's property in any manner the guardian deemed advisable unless the court otherwise ordered. However, in practice, the office of the Official Guardian had frequently requested the court to order that the guardian be subject to The Trustee Act investment provisions which restricted the guardian to certain investments.

The consequential amendment to The Infants Act provides that a guardian of the estate of an infant appointed by the court is subject to the provisions of The Trustee Act. The purpose of this amendment was presumably to make the investment provisions of The Trustee Act applicable to guardians in all cases.

It is submitted that sections 3, 4 and 6 of The Trustee Act establish a desirable standard of investments which a guardian may make. They are generally investments which would not put the child's property at risk. All guardians should be restricted to

these investments. However, some guardians might wish to make other investments and the proposed Act should outline how a guardian could obtain authorization for so doing. If a person applying to be appointed as guardian has plans for investments beyond those permitted by The Trustee Act, he should be able to request the court to authorize those investments. There may be some investments or classes of investments which the Public Trustee might authorize upon the guardian's request. Finally, a guardian should be able to apply to court for authorization to make such investments as the court approves as fit and proper. Notice of this application should be given to the Public Trustee.

That a guardian is authorized to make an investment should not absolve the guardian of taking proper care when so investing. Therefore it is proposed that nothing which authorizes a guardian to make an investment relieves him of his duty to take reasonable and proper care with respect to the investments so authorized.

13. Guardians subject to The Public Trustee Act

Section 31 of The Infants Act provides that a guardian of the estate of an infant appointed by the court is subject to the provisions of The Public Trustee Act. Guardians of the estate of an infant are defined in The Public Trustee Act. Therefore it is

unnecessary to state in The Infants Act that guardians are subject to The Public Trustee Act. The reference to that Act in section 31 should be deleted.

D. Miscellaneous Proposals

1. Definitions

Three definitions should be added to the Act. The first is "court" which should be defined so as to recognize both the Court of Queen's Bench and the Unified Family Court.

Secondly, "child" should be defined as a person under the age of eighteen. This is consistent with the age of majority and designed to eliminate any question as to the application of the Act.

Thirdly, "parent" should be defined to mean the mother and father of a child whether or not the mother and father are married to one another. This definition therefore includes the biological parents of a child. This reform is consistent with the judicial interpretation given to The Infants Act which has included the unmarried parents of a child.[31] This definition of

---

[31] Re Spence and McKenna et al (1981), 127 D.L.R. 761 (Sask. Q.B.), and Re Adam, [1975] W.W.R. 144 (Sask. Q.B.).

parent renders unnecessary the limited definition of parent contained in clause 2(2)(a) of the present Act.[32]

Finally, clause 2(2)(b) of the present Act defines "person" to include any school or institution. This definition is unnecessary and is not retained.

2. Maintenance

Section 6 of the present Act provides that the court may order the person to whom custody is awarded to pay a person who has been raising the child the cost incurred in bringing up the child. In section 17 of the present Act, the court is empowered to make an order for maintenance where there is a power of appointment in favor of an infant in a will or instrument. A comprehensive review of the law of maintenance of infants has not been undertaken in this paper. For this reason, sections 6 and 17 of the present Act have been incorporated in the proposed Act notwithstanding that the merit of these sections has not been evaluated.

---

32 Clause 2(2)(a) of the present Act defines parent for the purposes of sections 5 to 8 as any person at law liable to maintain the infant or entitled to his custody.

3. Joint Custody

The 1981 Custody Report recommended that a court should not make an order for the division or sharing of custody (joint custody) unless such an order is for the welfare of the child and there is a reasonable prospect that the persons to whom joint custody may be granted will co-operate. This provision reflects the state of the law respecting joint custody at the present time.

In some jurisdictions, however, a move is developing toward the greater use of joint custody orders. The Commission intends to review this development and proposals may result changing the present law. Therefore the recommendation relating to joint custody has not been incorporated in the proposed Act.

4. Transition

A provision is required to simplify the transition that results from the change in terminology. Since wills and documents drawn prior to the proposed Act will refer to the appointment of a guardian, the Act should provide that unless a contrary intention appears, references to a guardian of the person or to a guardian of the child shall be construed to refer to the person having custody of the child and a reference to a guardian with respect to the property or estate of a child shall refer to the guardian of the property of the child.

E. Testamentary Trusts for the Benefit of Children

As noted earlier, testamentary guardians of the property of children are not often appointed or required. Instead, the interest a child may have in a will is usually held in trust by a trustee. In practice there is little difference between the roles played by a guardian and trustee of a child's property. Both manage property in which a child is interested. Both owe a fiduciary duty to the child.

Two differences between guardians and trustees, however, were of concern to the office of the Official Guardian. Prior to The Public Trustee Act consequential amendments to The Infants Act, the Official Guardian could require a guardian of the property of a child or an executor of an estate in which a child was interested to bring in his accounts to be passed but could not do so in respect of a trustee appointed in a will to hold property for the benefit of a child. Further, trustees, unlike guardians, were not required to give any security before handling the child's property.

In the interest of protecting children's property, it was thought advisable that these differences be eliminated. The Infants Act was accordingly amended. Section 30 in effect requires a person (other than the executor) who is appointed a guardian or trustee of the estate of an infant in a will to be

appointed as a guardian under The Infants Act.[33] At the outset, there is a major difficulty with this provision. It is not appropriate in law to have trustees appointed as guardians under The Infants Act. Although the roles played by trustees and guardians of a child's property are very similar, the relationships are not interchangeable. In guardianship, the property is owned by the child and the relationship only arises by virtue of the child's incapacity in law to deal with the property. The guardian obtains no interest in the property and merely acts as the child's agent until the child comes of age at which time only possession of the property need be transferred to the child. As the infant owns the real property, it is registered in his name in the land titles system.

In a trust relationship the property is registered in the name of the trustee. The trust arises by reason of a will or trust document. Its duration depends on the terms of the will or trust document, which duration may or may not correspond with the minority of the beneficiary. The trustee acquires a legal interest in the property which must be transferred to the

---

33 The Public Trustee Consequential Amendment Act, supra, footnote 2. Section 30 of The Infants Act is reproduced at page 9 of this report. As it is proposed that all guardians must be court appointed, the reference to guardians appointed in wills in section 30 is unnecessary.

beneficiary upon termination of the trust. The appointment of trustees as guardians is confusing and ignores the fundamental differences between the relationships in law.

The intention behind section 30 must be examined. As a consequence of the provision, the Public Trustee can require the trustee as guardian to bring in his accounts and to have them passed. As there may be no person other than the Public Trustee looking after the child's interests, this result is desirable. However, instead of having the trustee appointed as guardian, it is proposed that The Public Trustee Act be amended to permit the Public Trustee to apply to court for an order compelling a person, other than an executor, appointed under a will to hold property in trust for a child, to file and pass his accounts.[34]

As a further consequence of requiring trustees, other than executors, to be appointed as guardians, trustees are required to apply to court for appointment and to provide such security as the court orders. It is submitted that the cost of this application together with the cost of maintaining the security outweigh any benefits which might accrue to the child. In addition, a person establishing a trust in a will has the power to require the trustee to provide a bond. By not requiring a

---

[34] The consequential amendment required for this change is in paragraph B, Appendix II.

bond, the person making the will has exhibited trust and confidence in the trustee. This aspect of the trust relationship should not be interfered with in every case.

There may, however, be cases where it would be appropriate for the court to review a trust to determine whether the trustee should give security before handling the property. Therefore it is proposed that the Public Trustee be given the power to apply to court for an order compelling the trustee, other than an executor, to give such security as the court orders.[35] In this way a balance is achieved. Not all trustees will be required to apply to court to give security, but in those cases where it is in the child's interests, the Public Trustee can apply to court to request that security be given.

IV. MISCELLANEOUS AMENDMENTS

A. The Public Trustee Act

There are a small number of amendments to The Public Trustee Act required because of the proposed Act. The Public Trustee Act defines "guardian" as follows:

> 2.(d) "guardian" means the guardian of the estate of an infant appointed under section 21 of The Infants Act who has:
>
> (i) filed a bond of a guarantee company in an amount approved by the court under subsection 27(1) of The Infants Act; or

---

35 The consequential amendment required is in paragraph A, Appendix II.

(ii) obtained an order under subsection 27(3) of The Infants Act dispensing with the requirement of a bond;

but does not include a guardian of the person of an infant or a testamentary guardian of an infant unless the guardian of the person of the infant or the testamentary guardian has also been appointed the guardian of the estate of an infant pursuant to section 21 of The Infants Act.

In the proposed Act all guardians must file a bond or have the requirement of a bond dispensed with. Paragraphs 2(d)(i) and (ii) can therefore be deleted. The proposed Act makes it clear that the guardian of the property of a child is distinct from the person having custody. Further, since all guardians must be court-appointed, reference to testamentary guardians is unnecessary. The definition of guardian should therefore read:

2.(d) "guardian" means the guardian of the property of a child appointed under section 21 of The Children's Act.

Since guardian is defined as the guardian of the property of a child, reference to "the infant's estate" in subsection 15(1) or "the estate of" an infant in subsection 20(1) is unnecessary.

Although a guardian holds an office of trust, a guardian is generally not a trustee for the purposes of The Trustee Act. Therefore subsection 17(3) of The Public Trustee Act which refers to a "guardian or other trustee" should be amended to read "guardian or trustee".

Finally, as the concept of letters of appointment has not been included in the proposed Act, the reference to such letters in subsection 20(3) should be deleted.

B. The Trustee Act

There are a small number of provisions in The Trustee Act which duplicate provisions in the present Act and the proposed Act. As it is desirable to consolidate provisions relating to guardians of the property of children where possible, these provisions of The Trustee Act should be repealed. Section 79 of The Trustee Act allows a guardian to apply to the court in respect of a question regarding the management or administration of the property. The proposed Act contains a similar provision and for this reason the reference to guardianship in section 79 of The Trustee Act should be deleted. Secondly, section 80 of The Trustee Act provides a fair and reasonable allowance for the guardian's services. As the proposed Act contains a provision in this regard, reference to guardians in section 80 of The Trustee Act should be deleted. Thirdly, section 84 of The Trustee Act allows the court to consider that a solicitor who acts as guardian has provided professional services in that role and that reasonable allowance should be made for those professional services. This provision should be deleted. As a guardian is allowed a "reasonable amount" for his fees in the proposed Act,

the solicitor who is a guardian can argue that his fee is a reasonable amount for the care and management of the estate. A specific reference to professional fees is not required. As a result, reference to guardians in section 84 of The Trustees Act should be deleted.

C. Actions for Seduction

In the 1981 Custody Report the Commission recommended that actions for enticement or seduction of a child should be abolished. A Draft Act to implement this recommendation is provided in Appendix III.

APPENDIX I

An Act respecting the Custody and Maintenance of Children and the Guardianship of their Property

SHORT TITLE AND INTERPRETATION

Short title

1. This Act may be cited as The Children's Act, 1984.

Interpretation

2. In this Act:

"court"

(a) "court" means the Court of Queen's Bench or the Unified Family Court;

"child"

(b) "child" means a person under the age of 18 years;

"parent"

(c) "parent" means the father or mother of a child, whether or not they are married to each other.

CUSTODY AND ACCESS

Custody and access

3.-(1) In this Act:

(a) custody of a child is the authority to care for a child and his education, and to exercise that degree of control over the child that is consistent with the age, maturity and welfare of the child;

(b) access to a child includes:

(i) the entitlement to visit with and be visited by the child;

(ii) the same right as a person having custody of a child to make inquiries and to be given information as to the health, education and welfare of the child; and

(iii) the authority to exercise care and control over the child when exercising access to the child.

(2) Custody of or access to a child terminates:

(a) on the marriage of the child; or

(b) when the child attains the age of 18 years.

Persons equally entitled to custody of children

4.-(1) Except as otherwise provided in this Act, the parents of a child are equally entitled to custody of the child.

(2) Where persons equally entitled to custody of a child have entered into a written agreement providing for the custody of or access to the child, they are bound by the agreement until a court makes an order providing otherwise.

(3) Where persons are equally entitled to custody of a child and the custody of one of those persons has been terminated by written agreement or by an order of the court, the person whose custody is terminated is entitled to custody of the child on the death of the other, unless:

(a) the written agreement provides for custody of the child on the death of the person having custody; or

(b) the order has denied the person access to the child.

Application to court

5.-(1) On application by a parent or any other person, a court may make an order respecting the custody of or access to a child, or determining any aspect of the incidents of custody of the child.

(2) Where an application is made under subsection (1), the court may order that notice of the application be served on any person having an interest in the custody, care or upbringing of the child.

Orders as to custody

6.-(1) In making an order respecting custody, the court shall have regard* to the welfare of the child and, for that purpose, shall consider all the needs and circumstances of the child, including:

* Note - the word "only" appearing in the present Act has been omitted.

(a) the quality of the relationship and the love, affection and emotional ties between the child and:

(i) each person entitled to or claiming custody of the child;

(ii) relatives of the child and other members of the child's family;

(iii) persons involved in the care and upbringing of the child;

(b) the personality, character and emotional needs of the child;

(c) *the ability and willingness of the person applying for custody to provide the child with guidance and education, the necessaries of life and any special needs of the child;

(d) the preference of the child to the extent that the court considers appropriate, having regard to the age and maturity of the child;

(e) plans proposed for the care and upbringing of the child;

(f) the permanence and stability of the environment where the child will live; and

(g) the culture in which the child was raised.

(2) The court shall not make an order for custody on consent unless it is of the opinion that the order is for the welfare of the child.

* Note - the words "the capacity of the person applying for custody to be a parent" appearing in the present Act have been omitted.

Orders as to access

7.-(1) In making an order for custody or interim custody, the court may provide for access to the child by a parent or other person to whom custody has not been granted.

(2) In making an order respecting access the court shall have regard to the welfare of the child, and in doing so shall consider:

(a) the quality of the relationship between the child and the person to whom access may be granted;

(b) the personality, character and emotional needs of the child;

(c) the capacity of the person to whom access may be granted to care for the child during such times as the child is in the care of that person;

(d) the wishes of the child to the extent the court considers appropriate, having regard to the age and maturity of the child; and

(e) the effect that the granting of access may have on the relationship between the child and the person having custody of the child.

Variation of orders

8. A court shall not vary an order made by the court in respect of custody or access unless there has been a material change in circumstances that is likely to affect the welfare of the child.

Interim orders

9. The court may make an interim order for custody after an application for custody has been brought if it is necessary to do so to protect the welfare of the child.

TESTAMENTARY CUSTODY

Testamentary appointment

10.-(1) A person having custody of a child may by will appoint one or more persons to have custody of a child after the death of the appointor.

(2) An unmarried parent who is a minor may by written appointment appoint one or more persons to have custody of a child after the death of the appointor.

(3) An appointment under subsection (1) or (2) may be renounced by the person so appointed if the person has not taken custody of the child.

Testamentary appointment where joint custody

11.-(1) Subject to subsection (2), an appointment is not effective if at the time of death of the appointor, the appointor and another person were equally entitled to custody of the child or if the other person is entitled to custody of the child under subsection 4(3).

(2) Where persons entitled to custody of a child die within 15 days of one another, an appointment made by either of them is effective; and if each of them has appointed different persons, each of the persons so appointed shall be equally entitled to custody of the child.

PROCEDURE ON CUSTODY HEARING

Court may direct investigation

12.-(1) The court may, at any time during a custody proceeding, direct a social worker, psychologist, psychiatrist or other child care professional to conduct an investigation of any matter relating to custody or access and to report the findings of the investigation to the court.

(2) A written report of a person directed to conduct an investigation under subsection (1) may be admitted in evidence if it has been made available to the parties at a reasonable time prior to its admission.

(3) A person who prepares a written report that is admitted in evidence under subsection (2) shall, on the motion of a party to the proceedings, be available for cross-examination on the report.

(4) The report of a child care professional directed by the court to conduct an investigation is admissible without proof of

the qualification of the maker of the report, unless a party to the proceeding raises the issue of qualification upon cross-examination.

Court may appoint a friend of the court

13.-(1) The court may, at any time during a custody proceeding, appoint a friend of the court for purpose of assisting the court in determining and assessing the wishes of a child or providing evidence in respect of the child's welfare in any case in which a custody investigation and other evidence available to the court is not adequate for resolution of the issue of custody and access.

(2) The friend of the court may make representations as to the wishes of the child and may call evidence relevant to the child's wishes, and shall participate in the proceedings in the same manner as a party, unless otherwise provided by the court.

(3) The costs of the friend of the court shall be paid out of a fund established for that purpose, but the court may order one or more of the parties to indemnify the fund for all or part of the costs of the friend of the court.

Child may instruct counsel

14.-(1) Where the court, on application by a child who is the subject of custody proceedings or any person on his behalf, is satisfied that the child has sufficient maturity and understanding to instruct counsel, the court may [shall] order that the child be made a party to the proceedings and appoint legal counsel without appointing a guardian ad litem or next friend.

(2) The costs of the counsel appearing on behalf of the child under subsection (1) are in the discretion of the court, but the court may order that the costs be paid out of the fund referred to in subsection 13(3).

Court may confirm entitlement to custody

15.-(1) A court, on application, may make a declaratory order confirming the applicant's entitlement to custody of a child.

(2) The court may include in an order under subsection (1) or in a custody order a direction to any police force or constable in the province to enforce the order by return

of the child to the person named in the order if, in the opinion of the court, such a direction is necessary because the person who has possession of the child:

(a) is attempting to leave the province;

(b) has concealed or is attempting to conceal the child; or

(c) may forcefully resist return of the child to the person named in the order.

Department of Social Services

16.-(1) Any proceeding under The Family Services Act, 1973 brought before or during the custody proceeding shall be dismissed.

(2) The court, on application of an officer of the Department of Social Services, shall permit the officer to participate in the custody proceedings, and the court may:

(a) make an order under this Act for custody of the child; and

(b) make any order that may be made under Part I of The Family Services Act, 1973.

(3) Nothing in subsection (1) prevents an officer of the Department of Social Services from taking a child into custody under section 20 of The Family Services Act, 1973 or making provision of services to the child under section 17 of The Family Services Act, 1973; and a child taken into custody under section 20 of that Act shall, unless a court orders otherwise, remain in the custody of an officer of the Department of Social Services until an order for custody of the child is made under this Act.

(4) Where in an application for custody the court is of the opinion that the child is in need of protection, the court may adjourn the proceedings and direct the Department of Social Services to investigate the matter.

MAINTENANCE OF CHILDREN

Orders for maintenance of child

17.-(1) A court, on application,may make orders for the maintenance of a child by payment from time to time by either parent or by any

person having custody of the child, or out of any estate to which the child is entitled, according to the pecuniary circumstances of the parents or other persons, or the value of the estate.

(2) The court may, on application, alter, vary or discharge any order made under this section, where there has been a material change of circumstances since the making of the order.

(3) Where a court orders that a person having custody of a child give up custody, the court may further order that the person obtaining custody pay to that person all or part of the cost incurred in bringing up the child if it is just and reasonable to do so, having regard to all the circumstances of the case.

(4) Where by a will or other instrument property is given beneficially to a person for life with a power of devising or appointing the property by will in favour of one or more of his children, the court may on the application or with the consent of the tenant for life, order that such portion of the proceeds of the property as it thinks proper be applied towards the maintenance or education of any child in whose favour the power might be exercised. Subsection (1) applies notwithstanding that there is a gift over or a right conferred on a person to make a disposition of the property in the event that there are no children to take under the power.

GUARDIANS OF PROPERTY OF CHILDREN

Guardianship of child's property

18. In this Act, guardianship of the property of a child is the authority to care for and manage the real and personal property of the child, including the right to receive any money due and payable to the child and give a release in respect thereof.

Court may appoint guardian

19.-(1) On application of a parent, person named testamentary guardian in a will, or other interested person, a court may appoint one or more persons as guardian of the property of a child and no person other than a person so appointed is guardian of the property of a child.

(2) A testamentary appointment of a guardian of the property of a child is of no effect; but a person named as testamentary guardian in a will may apply under subsection (1) to be appointed guardian of the property of a child.

a

(3) Where an application is made under subsection (1), the court shall order that notice of the application be served on the Public Trustee and on any other person having an interest in the guardianship of the property of the child.

(4) Where more than one guardian of the property of a child is appointed, the guardians are jointly responsible for the care and management of the property of the child.

(5) In deciding an application for the appointment of a guardian of the property of a child, the court shall consider all the circumstances, including:

(a) the ability of the applicant to manage the property of the child;

(b) the merits of any plans proposed by the applicant for the care and management of the property of the child;

(c) the relationship between the applicant and the child;

(d) the preferences of the child to the extent that the court considers appropriate, having regard to the age and maturity of the child.

Record of appointments

20. The clerk of the Court of Queen's Bench shall keep a record of every appointment and removal by the court of a guardian of the property of a child.

Security

21. The court shall require a guardian of the property of a child, other than the Public Trustee, to post a bond, with or without sureties, payable to the child in an amount that the court considers appropriate, but the court may dispense with the requirement of a bond if it is of the opinion that such a bond is not needed to protect the interests of the child.

Investments

22.-(1) A guardian of the property of a child may invest the child's property:

(a) in any of the investments permitted under sections 3, 4 and 6 of The Trustee Act;

(b) in such investments as the court approves in the order appointing the guardian of the property of the child;

(c) in any investment to which the public trustee gives written approval.

(2) A guardian of the property of a child may invest the child's property in such other investments as a court, on application by a guardian, approves as fit and proper; and the court may require the guardian to post a bond, with or without sureties, payable to the child in an amount that the court considers appropriate.

(3) Notice of an application made under subsection (2) shall be given to the public trustee.

(4) Nothing in this section relieves the guardian of his duty to take reasonable and proper care with respect to the investments so authorized.

Application for directions

23.-(1) Where two or more persons equally entitled to guardianship of the property of a child cannot agree respecting the guardianship of the property, any of them may apply to the court for a resolution of the dispute or for directions.

(2) Where a guardian of the property of a child has a question respecting the guardianship of the property, he may apply to the court for directions.

Removal of guardian

24.-(1) A guardian of the property of a child may be removed by a court for the same reasons for which a trustee may be removed.

(2) A guardian of the property of a child may, by leave of the court, resign his office on such terms and conditions as the court considers appropriate.

Passing of accounts

25.-(1) On application on behalf of a child by a person considered by the court to be a proper person to represent the interests of the child, the court may require that a guardian of the property of a child, other than the Public Trustee, bring in his accounts with respect to the administration of the property, and when the accounts are brought in, examine and pass them.

(2) The authority of the court in subsection (1) extends to a final passing of accounts after the termination of the guardianship.

Transfer of property on majority

26.-(1) Guardianship of the property of a child terminates:

(a) on the marriage of the child; or

(b) when the child attains the age of 18 years.

(2) A guardian of the property of a child shall transfer to the child all property of the child in the care of the guardian on termination of the guardianship.

Fees of guardians

27. A guardian of the property of a child is entitled to payment of a reasonable amount for his fees for and expenses of management of the property of the child.

GENERAL

Construction of instruments

28. In any instrument, Act or regulation, unless the contrary intention appears, a reference to a guardian with respect to a child or the person of a child shall be construed to refer to custody of the child and a reference to a guardian with respect to the property or estate of a child shall be construed to refer to guardianship of the property of the child.

R.S.S. c. I-9 repealed

29. The Infants Act is repealed.

Coming into force

30. This Act comes into force on a day to be fixed by proclamation of the Lieutenant Governor.

APPENDIX II

CONSEQUENTIAL AMENDMENTS

TO

THE PUBLIC TRUSTEE ACT

A. 23.1 Where any person is appointed under a will to hold property in trust for an infant, the public trustee may apply to the court for an order requiring the trustee to post a bond, with or without sureties, payable to the infant in an amount that the court considers appropriate; and the court may make such an order if it thinks that it is fair and appropriate that security be given.

B. 41(2) Where a person, other than an executor, is appointed under a will to hold property in trust for an infant, the public trustee may apply to the court at any time he considers necessary or advisable for an order to compel the trustee to file and pass his accounts.

(3) Following a passing of accounts under subsections (1) or (2), the public trustee may take any further steps or proceedings that he considers necessary to protect the infant or mentally incompetent person and may, if it appears necessary to do so, apply under The Trustee Act for an order discharging the executor, administrator or trustee and replacing him with a judicial trustee.

APPENDIX III

An Act respecting the Abolition of Actions for Seduction

Short Title

1. This Act may be cited as The Seduction Actions Abolition Act.

Abolition of certain actions

2. No action shall be brought for the enticement, harbouring, seduction or loss of services of a child.

Rev. Stat. c. S-43

3. The Seduction Act is repealed.

POOR

QUALITY

ORIGINAL